Hospital discharge and the Mental Capacity Act

May 2023

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The context (1)

- The MCA does not give a public body a **power** to do anything or impose any **duties** to take **substantive** action, rather it is a workaround for the situation where the person cannot consent to an action taken by a public body exercising a power

- So what **powers** and duties are actually in play in the hospital discharge context?

- Nb, what follows is not a comprehensive list, but seeks to set out the key relevant powers/duties

- For everyone:
  - Powers to cooperate under s.75 NHS Act
  - Duties to cooperate under s.82 NHS Act / ss.6/7 Care Act
  - Duties to use powers where criteria are met (e.g. CHC funding / meeting assessed needs under Care Act)
  - General procedural duties under e.g. Human Rights Act 1998 (e.g. to act compatibly with Article 5 ECHR) and Equality Act 2010

- Hospital Trust powers
  - To provide care to patient (statutory – NHS Act)
  - To require patient to leave when considered no longer clinically appropriate for them to be in hospital (common law trespass / possession: see *University College London Hospitals NHS Foundation Trust v MB* [2020] EWHC 882 (QB))

The context (2)

- Local authority powers
  - To assess the person's / carer's needs (statutory – Care Act 2014)
  - To meet the person's / carer's needs (statutory – Care Act 2014)
  - To provide housing where necessary to avoid homelessness (statutory – housing legislation, particularly Housing Act 1996)
  - To exercise its 'general power of competence' (s 1 of the Localism Act 2011), which gives it the power to do anything that individuals generally may do

- ICB powers
  - To commission health services (statutory – NHS Act)
  - To do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any function conferred on by the NHS Act (s.2 NHS Act)
  - To assess for CHC where duty arises (regulation 21(2) of the Standing Rules), and then to meet needs (NHS Act / Standing Rules)

The context (3)

Other service-providing powers and duties also have their own principles and criteria, which do not depend upon what is best for the service user, although that will no doubt be a relevant consideration. The Care Act 2014, which is not relevant in this particular case but will be relevant in many which come before the Court of Protection, creates a scheme of individual entitlement to care and support for people in need of social care. But it has its own scheme for assessing those needs (section 9) and its own scheme for determining eligibility (section 13) and then deciding how those eligible needs should be met (section 24). The Act even provides for the possibility of introducing appeals to a tribunal (section 72), although this has not yet been done. The National Health Service also has its own processes for assessing need and eligibility, albeit not in a legislative context which recognises individual legal entitlement. Decisions can, of course, be challenged on the usual judicial review principles. Decisions on health or social care services may also engage the right to respect for private (or family) life under article 8 of the European Convention on Human Rights, but decisions about the allocation of limited resources may well be justified as necessary in the interests of the economic well-being of the country (see *McDonald v United Kingdom* [2015] 60 EHRR 1). Here again, therefore, the legal considerations, both for the public authority and for the court, are different from those under the 2005 Act.

N v ACCG & Ors [2017] UKSC 22 at paragraph 37

Hospital discharge and capacity – the context

- MCA silent on (1) what the relevant decisions are; and (2) who should make them, and the July 2022 iteration of Hospital discharge and community support guidance (further iteration promised for 'autumn' 2022…) is cryptic

  Mental capacity should be assessed on a decision-specific basis. If there is a reason to believe a person may lack the mental capacity to make relevant decisions about their discharge arrangements at the time the decisions need to be made, a capacity assessment should be carried out as part of the discharge planning process. Where the person is assessed to lack the relevant mental capacity to make a decision about discharge, a best interests decision must be made in line with the Mental Capacity Act 2005 and usual processes. No one should be discharged to somewhere assessed to be unsafe, and the decision maker must make the best interests decision.

- Wider statutory framework now seeks to push decision-making outside the hospital setting –
  - Repeal of Schedule 3 to the Care Act and Care and Support (Discharge of Hospital Patients) Regulations 2014

  - July 2022 guidance: adult social care 'action cards'

    in general, do not undertake social care needs or funding assessments in the acute hospital. Acute-based safeguarding investigations should continue
    […]
    an adult social care (ASC) presence in the acute trust should be reduced but ASC staff will still need to work closely with acute colleagues and some presence, probably in the form of a senior social worker, will be required

The MCA and decision-making – the draft updated Code

Who is the decision-maker?

5.15 In the Code, and in everyday use, the term "decision-maker" is frequently used. However, in general, it is important to understand that the Act does not identify any formal decision-makers. The exceptions are:

- If a Lasting Power of Attorney or Enduring Power of Attorney has been made and registered, or a deputy has been appointed under a court order, then the attorney or deputy will be the decision-maker for decisions within the scope of their authority;
- Where the Court of Protection makes the decision on behalf of the person (see Chapter 7)

5.16 In every other case, the Act does not say that any specific person or type of person is the decision-maker. Wherever appropriate, a decision as to what is in the best interests of a person unable to take the relevant decision should be reached informally and collaboratively between those involved in their care or interested in their welfare, whether paid/professional or unpaid. This means that:

- The fact that someone is seen as the person's next of kin does not mean that they have any legal right to make any decision on their behalf; but also that
- A professional does not have a right to make the decision on behalf of the person simply because they occupy a particular position.

5.17 However, it still makes sense to think of a "decision-maker" because of the way in which the Act works.

5.18 Anyone who wants out to carry an act in connection with the care or treatment of another will only be protected from criminal and civil liability if they reasonably believe that the person lacks capacity to make the relevant decision and that the action to be taken is in the person's best interests (see chapter 6).

5.20 In other cases, the person actually carrying out the act will be acting on the direction or under the supervision of another, or subject to a plan drawn up by someone else. In each case, the person will themselves have to be satisfied that they are acting in the best interests of the individual before carrying out the act, but are likely to being relying upon the views set down in the plan. In that case, it will be the person who is responsible for the plan who could be thought of as "the decision-maker." In the hospital context, for instance, the consultant in charge of the patient's care should usually be thought of as the decision-maker.

5.21 In any such situation, especially if there are different staff involved in the person's care from different organisations, it is important that there is one person who is identified as having the responsibility for the coordination of the process to determine what is in the individual's best interests. This may be the person who can be seen as the "decision-maker" in the way set out above, but in some cases, it could be more appropriate for that person to delegate this task to someone who has the right set of skills to facilitate the process of considering all the matters set out under the Act.

5.22 In all cases involving an organisation there must, however, ultimately be one person who is prepared to take responsibility on behalf of that organisation for the conclusion that the step being taken is in the best interests of the individual concerned. That does not mean that they have the right to take that decision, but simply that they are accountable for it.

5.23 It is important that everyone involved in the best interests decision-making process knows and agrees who the decision-maker is, and that, no matter who is making the decision, the most important thing is that the decision-maker tries to work out what would be in the best interests of the person who lacks capacity. The decision-maker should try to identify any of their own unconscious biases to ensure they do not influence the best interests decision.

Hospital discharge: who is the decision-maker (and how is capacity relevant)? (1)

- Hospital Trust:
  - Deciding upon treatment for the patient whilst in hospital (on the basis of capacitous consent / best interests if lacking capacity)
  - Whilst patient is in hospital, deciding if they are deprived of their liberty (capacity relevant if they are confined)
  - Deciding whether continued treatment in hospital is clinically appropriate (capacity irrelevant)

- Local authority:
  - Deciding upon assessment of needs (capacity relevant to participation)
  - Deciding upon how to meet assessed needs (capacity relevant to choices being made between available options)
  - Deciding upon steps required to safeguard person, including against risk of abuse or neglect if discharged into unsuitable accommodation or into unsuitable arrangements (capacity relevant to exercise of powers to secure against risk of abuse)
  - Deciding whether to authorise deprivation of liberty of adult in hospital or care home (capacity relevant to whether person deprived of their liberty)
  - Deciding whether to seek judicial authorisation of deprivation of liberty for non-DoLS case, if not CHC-funded (capacity relevant to whether person deprived of their liberty)
  - Not the decision-maker as to whether clinically appropriate for person to stay in hospital (capacity irrelevant)

Hospital discharge: who is the decision-maker (and how is capacity relevant)? (2)

- ICB:
  - Deciding whether person meets CHC criteria (capacity relevant to participation)
  - Deciding how to meet CHC-funded needs (capacity relevant to choices being made between available options)
  - Deciding whether to seek judicial authorisation of deprivation of liberty for CHC-funded cases (capacity relevant to whether person deprived of their liberty)
  - Query whether also a decision-maker as to whether clinically appropriate for person to stay in hospital (capacity irrelevant)

Key MCA questions for any given case

- Do you know what decision is in play, who is making it, and whose behalf they are acting?
- Who is in charge of identifying the options?
- Who (if anyone) has a power or duty to put options on the table?
- On what basis are options ruled in or ruled out of best interests determination?
- How can making best interests decisions **quickly** and making the **right** decisions applying the s.4 checklist be reconciled?
- Who is in charge of revisiting decisions made quickly? And within what time-frame?

Hospital discharge and deprivation of liberty

- DoLS can only authorise deprivation of liberty in hospital / care home for those aged 18+
- Cannot authorise deprivation of liberty in transit or anywhere else
- Cannot authorise deprivation of liberty in any form of virtual ward which is not in a care / nursing home unless it is, in fact, a hospital for purposes of Schedule A1
- Community DoL
  - Well-documented problems with delay, but s.4B provides cover from point of making the application to court if 'vital act' criteria are met
  - Getting the priority right: substantive interests of person are more important than their procedural rights in this context

More resources

- [39 Essex Chambers | Mental Capacity Law | 39 Essex Chambers | Barristers' Chambers]
- [Mental Health & Justice | (mhj.org.uk)]
- [Mental Capacity Law and Policy]
- [MCA Directory | SCIE]
- [Mental Health Law Online]

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